

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JOHN ODLAND
53 Laurel Hill Drive
Westtown, NY 10998

MICHAEL MOJICA
180 Jacobs Rd
Westtown, New York 10998

Plaintiffs,

v.

C.A. No. 13-cv-_____

FEDERAL ENERGY
REGULATORY
COMMISSION
888 First St., NE
Washington, DC 20426

Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

1. Plaintiffs John Odland and Michael Mojica, by and through undersigned counsel, bring this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and the Administrative Procedure Act to order the production of agency records related to

the Federal Energy Regulatory Commission's (Commission) decision issuing a certificate to the Millennium Pipeline Company, L.L.C. ("Millennium") to construct and operate the Minisink Compressor Station pursuant to Section 7 of the Natural Gas Act,¹ 15 U.S.C. §717f(c). Specifically, Messrs. Odland and Mojica demand production of (a) landowner lists; (b) the 574 documents erroneously designated as agency drafts and internal discussions; and (c) hydraulic models and related staff work papers, methodologies and analysis referenced in the Commission's certificate order. The Commission's withholding of these documents was arbitrary and capricious and violated FOIA and the Commission's corresponding regulations implementing FOIA, 18 C.F.R. Part 388. Further, the Commission's unlawful withholding of documents deprived Plaintiffs Odland and Mojica of their due

¹ *Millennium Pipeline Company, L.L.C.*, Order Issuing Certificate, Docket CP11-515, 140 FERC ¶ 61,045 (July 17, 2012); *Millennium Pipeline Company, L.L.C.*, Order Denying Requests for Rehearing, Denying Request to Reopen and Supplement the Record, and Denying Request for Stay, Docket CP11-515, 141 FERC ¶ 61,198 (December 7, 2012).

process rights, under the Administrative Procedure Act, 5 U.S.C. § 553(c), to meaningfully comment on, and challenge, what should have been an on the record decision by the Commission.

JURISDICTION

2. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

A. Plaintiffs Odland and Mojica

3. Plaintiffs John Odland and Michael Mojica are residents of Minisink, New York, a rural-residential community where the Minisink Compressor Station is currently under construction by Millennium, following the Commission's authorization of the project in July 2012. Mr. Mojica lives within 1000 feet of the compressor station, and Mr. Odland lives .8 miles from it. Both have participated in the Commission certificate process since its inception in 2011. Plaintiffs Odland and Mojica are also members of the Minisink Residents for Environmental Preservation and

Safety (MREPS), an unincorporated association formed in April 2012 to oppose the Minisink Compressor Station.

4. Plaintiffs Odland and Mojica, along with MREPS, were granted intervention in the Commission proceeding, which affords them all of the rights that accompany party status, including the right to service of documents submitted by participants (including the project sponsor, Millennium),² the right to file comments on the project proposal and the Commission–prepared Environmental Assessment,³ and the right to seek rehearing and judicial review of an adverse Commission decision.⁴
5. Plaintiffs Odland and Mojica are directly and adversely impacted by the Commission’s unlawful withholding of documents. Inability

² 18 C.F.R. § 385.2010 (requiring all parties to a proceeding to serve any document it files on each person on the official service list).

³ 40 C.F.R. § 1506.6 (requiring the agency solicit appropriate information from the public in preparing National Environmental Policy Act related documents.); 18 C.F.R. § 380.9 (stating that the Commission will comply with 40 C.F.R. § 1506.6).

⁴ 15 USC § 717r(b)(2006) (allowing for review of Commission orders in the U.S. Court of Appeals for the District of Columbia or in the circuit where the natural gas company is located or has its principal place of business).

to access the withheld documents in a timely fashion prevented Plaintiffs Mojica and Odland from meaningfully participating in the FERC process and will likewise, interfere with their and MREPS' ability to challenge the Commission order on judicial review.⁵ The documents sought are necessary in order for Plaintiffs Mojica and Odland to (a) understand the facts and methodologies upon which the Commission based its decision to grant a certificate for the Minisink Compressor Station, (b) to prepare an effective challenge, and (c) to determine whether the Commission's order may have resulted from improper *ex parte* communications or other undue influence.

6. Prompt release of the information is essential so that Plaintiffs Odland and Mojica, and MREPS, can use these documents in their

⁵ MREPS filed a Petition for Review in the D.C. Circuit Court of Appeals. The case name is *Minisink Residents for Environmental Preservation and Safety, et. al v. Federal Energy Regulatory Commission*, Docket No. 12-1481. MREPS filed this petition on December 20, 2012.

challenge to the Commission's order,⁶ which is currently pending issuance of a briefing schedule at the D.C. Circuit.

B. Defendant Federal Energy Regulatory Commission

7. Defendant, Federal Energy Regulatory Commission, is an agency of the United States and has possession of the documents that plaintiffs seek. The Commission has stymied Plaintiffs Odland's and Mojica's access to documents through endless delays and extensions and in doing so, has not only violated FOIA but also deprived plaintiffs of their due process rights to meaningful participation in the certificate proceeding.

⁶ Under Section 717r(c) of the Natural Gas Act, parties seeking judicial review may raise arguments not previously raised before the Commission where there was "reasonable grounds for failure to do so." Likewise, parties may also seek leave of the court to adduce additional evidence upon a showing of reasonable grounds for failing to do so earlier. Lack of access to documents as a result of the Commission's unlawful withholding under FOIA constitutes reasonable grounds for failure to submit evidence earlier, and as a result, Plaintiffs Odland and Mojica will be able to use evidence produced in this proceeding in MREPS' judicial challenge to the Commission's order.

FACTS

A. Facts Related to FERC Withholding of Documents

8. On July 14, 2011, Millennium Pipeline filed an application at the Commission for a certificate under Section 7 of the Natural Gas Act to construct and operate a compressor station in Minisink, New York, in close proximity to numerous residences, including those of Plaintiffs Odland and Mojica. Many of the documents and exhibits accompanying the application, including Exhibit G Flow Diagrams and Cultural Resources Report, were classified as confidential or privileged and therefore, not made available to the Plaintiffs.⁷
9. On February 29, 2012, the Commission published the Environmental Assessment (EA) prepared by Commission staff.

⁷ The Exhibit G flow diagrams are considered confidential critical energy infrastructure information (CEII) under the Commission's regulations. 18 C.F.R. § 388.112(a), and therefore are exempt from disclosure under FOIA. The Commission has promulgated a separate set of regulations governing disclosure of CEII information which Plaintiff Odland received after six months of making his initial request. However, Plaintiff Odland was not permitted to share the CEII information received with Plaintiff Mojica, who was required to file another CEII request. Plaintiff Mojica received the same CEII materials provided to Plaintiff Odland within two months of making his request.

The EA included inaccurate factual information (such as the number of landowners within the vicinity of the proposed project and other alternative locations and the results of various studies) and also reached conclusions that substantially differed from what Plaintiffs Odland and Mojica had anticipated based on the record evidence that they had reviewed and ongoing interaction with staff, which raised the possibility of *ex parte* communications or undue influence.

10. Accordingly, by letter dated March 7, 2012, Mr. Odland, requested information related to the Commission's certificate proceeding and the EA. On March 14, 2012, he filed an amended request where he requested access to the studies and analyses that the Commission used to support its decision as well as to landowner lists (to corroborate the number of residents within the vicinity of the project). He made these requests early in the proceedings, while the comment period for the EA was still open, in hopes that he could get information to help him meaningfully comment on the EA. Mr. Odland's letters are attached as Exhibit 1.

11. On August 10, 2012, following issuance of the Commission's order approving the project, Mr. Mojica requested copies of hydraulic studies, models, and methodologies referenced in the Commission order. A copy of Mr. Mojica's letter is attached as Exhibit 2.
12. By letter dated November 8, 2012, the Commission denied Mr. Odland access to the requested information on the grounds that it was exempt from disclosure under Exemptions 3, 4, 5, 6, and 7(F). 5 U.S.C. §§ 552(b)(3)-(7). A copy of the Commission's November 8, 2012 letter is attached as Exhibit 3.
 - a. The Commission invoked Exemption 3, which exempts disclosure of information protected under other federal law, in denying Mr. Odland access to the Cultural Resources Report. The Commission determined that the information was protected from disclosure under the National Historic Preservation Act, 16 U.C.S. §§ 470 *et. seq.* (2006).
 - b. The Commission withheld the hydraulic data under Exemption 4, which protects trade secrets and certain financial data. It claimed that the data contained

confidential commercial information about negotiated agreements.

- c. Also in withholding the hydraulic data, the Commission claimed that because the data contained details about the project, the information was protected under Exemption 7(F), which protects information that could reasonably be expected to endanger the life or physical safety of any individual.
- d. The Commission withheld the landowner lists under Exemption 6, which provides that the agency should not disclose information that would constitute an unwarranted invasion of personal privacy.
- e. The Commission withheld 574 documents under Exemption 5, which protects inter-agency communications that would not be available in litigation to the requesting party. This information was critical to MREPS to fully understand the facts underlying the Commission's decision and to explore the possible existence of wrongful *ex parte* communication between the Commission and Millennium.

13. By letter dated November 20, 2012, the Commission denied Mr. Mojica access to the requested information on the grounds that it was exempt from disclosure under Exemptions 3, 4, 5, and 7(F). 5 U.S.C. §§ 552(b)(3)-(5), (7). The Commission made the same assertions in response to Mr. Mojica's request as it did to Mr. Odland's request. A copy of the Commission's November 20, 2012 letter is attached as Exhibit 4.

14. By letter dated December 3, 2012, Mr. Odland appealed the denial of his request of the 574 documents withheld under Exemption 5, the landowner lists withheld under Exemption 6, and the Cultural Resources Report withheld under Exemption 4. A copy of this appeal letter attached as Exhibit 5.

- a. To rebut the withholding of information under Exemption 5, Mr. Odland used the Commission's statements that it engaged in an independent analysis of the "hydraulic data" in reaching its decision to grant the certificate, to support the claim that the information was not pre-decisional, but was, in fact, a part of the decision.

- b. In appealing the withholding of the landowner lists, Mr. Odland asserted that MREPS sought to verify the discrepancy between MREPS and the Commission regarding the number of landowners that would be affected by the project. The Commission calculated that only 84 homes would be affected, while MREPS had concluded that 239 homes would be affected.
 - c. Finally, to rebut the withholding of information under Exemption 4, Mr. Odland highlighted how MREPS wanted the information in an effort to preserve the town's prized historic resources.
- 15. By letter dated December 12, 2012, Mr. Mojica appealed the denial of his request of the agency data withheld under Exemption 5 and the Cultural Resources Report withheld under Exemption 3, making the same claims that Mr. Odland had made in his appeal to rebut those withholdings. A copy of this appeal letter attached as Exhibit 6.
- 16. By letter dated January 17, 2013, the Commission granted Mr. Odland's appeal regarding the Cultural Resources Report, but

denied the rest of the appeal, continuing to withhold the 574 documents. A copy of this letter is attached as Exhibit 7.

17. On January 29, 2013, the Commission denied Mr. Mojica's appeal and refused to release Commission staff's work papers and analysis. A copy of this letter is attached as Exhibit 8.

18. Because the Commission continued to seek extensions to respond to the filed requests, Messrs. Odland and Mojica waited for the Commission's process to run its course. As of January 17 and January 29 respectively, Plaintiffs Odland and Mojica have fully exhausted all applicable administrative remedies, and have proceeded expeditiously to file this action.

B. Facts Related to the Commission's Withholding of Documents

19. On June 26, 2012, Mr. Mojica made his initial request for information related to the Commission's certificate proceeding. A copy of this request is attached as Exhibit 9. This request, which asked for 25 items, included:

- a. A list of landowners that would be affected by the Wagoner Meter Station, the Huguenot Meter Station, the Minisink Compressor Station, and the Neversink Segment; and

b. A copy of all communications between Millennium and the Commission.

20. By letter dated August 10, 2012, the Commission granted the request of items 10–14, providing access to 28 documents. Thirteen of the documents were redacted pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), which provides that the agency should not disclose information that would constitute an unwarranted invasion of personal privacy. The Commission also provided 102 documents that it released pursuant to earlier, related FOIA requests. The Commission stated that the remaining documents would be provided on a rolling basis. However, nearly six months later, the Commission has yet to issue a final determination on this FOIA request. The August 10, 2012 letter is attached as Exhibit 10.

**COUNT I: VIOLATION OF THE FREEDOM OF INFORMATION
ACT**

21. Plaintiffs repeats and realleges paragraphs 1–20 of this Complaint.

22. Plaintiffs have a right to access to the requested information under 5 U.S.C. § 552(a)(3). The Commission's withholding of the requested information is arbitrary and capricious and violates the Freedom of Information Act and 18 C.F.R. Part 388.

COUNT II: ADMINISTRATIVE PROCEDURE ACT VIOLATIONS

23. Plaintiffs repeat and reallege paragraphs 1–20 of this Complaint.

24. The Commission is obligated to engage in on the record decision making under the Administrative Procedure Act, 5 U.S.C. § 553(c), and provide opportunities for participants to access evidence in the record and comment on and challenge agency actions. 5 U.S.C. §§ 552(a)(3), 552(a)(4)(b), 552(d).

25. By delaying the processing of Plaintiffs Odland's and Mojica's FOIA requests and unlawfully withholding information related to hydraulic studies and methodologies, landowner lists and other information relevant to challenging the Commission's order, the Commission deprived Plaintiffs Odland and Mojica of their right to meaningfully participate in certificate process in violation of the Administrative Procedure Act. Moreover, because the APA permits parties to seek judicial review of Commission orders 5 U.S.C. § 702,

the Commission's continued unlawful withholding of the requested information will interfere with Plaintiffs Odland's and Mojica's and MREPS' right to appeal.⁸

26. Further, the Commission's own regulation, 18 C.F.R. § 2010, requires parties to a Commission proceeding to serve all parties on the official service list with any document filed in the proceeding. As intervenors in the Commission proceeding, Plaintiffs Odland and Mojica were entitled, under the Commission's own regulation, to all documents filed by Millennium with the Commission in this proceeding. This includes landowner lists, hydraulic studies and any other communications that Millennium may have had with staff. The Commission's failure to disclose documents submitted by

⁸ Plaintiff Mojica sought judicial review of the Commission order, but on January 7, 2013, he voluntarily withdrew his petition to seek a second round of rehearing on one aspect of the Commission's decision. On January 31, 2013, the Commission denied Mr. Mojica's rehearing request. Mr. Mojica intends to refile his petition for review at the same time as this complaint is filed. Further, MREPS has already filed a petition for review pending at the court and it was plaintiffs' intent to use any information produced through FOIA in support of MREPS' judicial challenge.

Millennium (or other parties) to the Commission and responsive to Plaintiffs Odland's and Mojica's requests violates the Commission's own regulations and is therefore unlawful under the Administrative Procedure Act.⁹

RELIEF

WHEREFORE, plaintiffs request this Court:

- (1) Order the Commission to provide access to the requested documents under FOIA and the APA and a *Vaughn* Index of any responsive records withheld under claim of exception;
- (2) Expedite this proceeding as provided for in 28 U.S.C. § 1657;
- (3) Award plaintiff costs and reasonable attorneys fees in this action, as provided in 5 U.S.C. § 552(a)(4)(E); and

⁹ Plaintiffs note that the Commission's failure to release documents that should have been served under Rule 2010 only applies to those materials requested by plaintiffs that was *submitted* to the Commission by Millennium or other parties. Plaintiffs acknowledge that documents created by or gathered by the Commission (such as independent hydraulic studies and models, or the methodologies in support of those studies), while subject to release under FOIA (see Count I) are not required to be served under Rule 2010 as they are not submitted by other parties.

(4) Grant such other and further relief as may deem just and proper.

Dated: February 4, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2013, I caused to be served electronically and first class mail, postage prepaid a copy of the foregoing Petition for Review on the General Counsel, Federal Energy Regulatory Commission, 888 First Street N.E., Washington D.C. 20426 and electronically via the Commission's e-service list on the parties admitted to the proceeding before the Federal Energy Regulatory Commission, listed on the attached service list.

Respectfully submitted,

Carolyn Elefant

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